

IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

IN RE THE MARRIAGE OF DILLER

DOROTHY DILLER,
and *Petitioner,*

STANLEY Z. DILLER,
Petitioner,

SELVIN & WEINER, a Prof. Corp.,
and *Respondent,*

ROBINSON, ROBINSON & PHILLIPS, INC.,
Respondent.

On Petition for Writ of Certiorari to the
Second Appellate District Court of the State of California

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

This brief is filed on behalf of respondent Selvin & Weiner ("S&W"), a professional corporation, in opposition to related petitions for certiorari filed by Stanley Z. Diller ("Husband"), No. 91-616, and by Dorothy Diller ("Wife"), No. 91-635. Both petitions ask the Court to overturn a judgment entered in a marital dissolution proceeding between Husband and Wife insofar as the judgment orders payment of attorneys' fees and costs to S&W, the attorneys who represented Wife in

that proceeding, and to respondent Robinson, Robinson & Phillips ("RR&P"), the attorneys who represented Husband in that proceeding, to be paid from petitioners' community property.

Each petitioner contends that payment of fees and costs to its *own* attorney from their community property violates the Due Process Clause of the Fourteenth Amendment.¹ The questions presented are worded differently, but in essence, each petitioner argues that it was denied an opportunity to use *independent* counsel to present evidence, cross-examine, and challenge the reasonableness of the fee award requested by its own trial counsel, in violation of the Due Process Clause.

SUMMARY OF ARGUMENT

This case does not meet any of the Court's traditional criteria for granting certiorari. To the contrary, the decision below, of an intermediate state court, does not conflict with any other state or federal decision. Point I. The question presented is of importance only to the parties, and was correctly decided on the basis of unique facts that are unlikely to arise again. Point III. Finally,

¹ In their briefs to the California Court of Appeal, neither petitioner contested payment of fees and costs from their community property to the attorney for the other petitioner. Wife's opening brief at pages 1, 2 n.3, and 42-43; Husband's opening brief at pages 2, 18 and 33. Thus, if the petitions are confined, as they should be, to the questions petitioners briefed below, the petitions raise purely academic questions; even if the relief petitioners sought below had been granted by the California Court of Appeal, respondents S&W and RR&P would still have been paid in full from the community property. In addition, Wife expressly acknowledged below that she was "*not* by this appeal questioning S&W's [her attorneys'] entitlement to fees or the actual amount of fees awarded." Petition for Rehearing, at 2 n.2 (emphasis added). Thus, there is no Article III case or controversy between Wife and S&W. Wife in effect asked the California Court of Appeal to issue an advisory opinion that the procedures used by the trial court to determine S&W's fees violated the Due Process Clause, but she conceded that the fees so determined were correct.

petitioners have expressly waived the due process objections on which their petitions are based. Point II.

REASONS FOR DENYING THE WRIT

The petitions seriously distort the factual record and omit material facts on which the decision below was squarely based. However, it is not necessary to detail all of those distortions and omissions in order to demonstrate that the petitions should be denied, for three independent reasons.

I. THERE IS NO CONFLICT.

There is *no conflict* regarding the requirements of the federal Due Process Clause in these circumstances. Petitioners point to other cases in which other courts have decided, on common law or statutory interpretation grounds, to allow independent counsel to oppose fee applications by trial counsel, but none of those cases held that the federal Due Process Clause requires that result.

II. PETITIONERS HAVE TWICE WAIVED ANY RIGHT TO ASSERT THE DUE PROCESS QUESTION THEY ASK THE COURT TO RESOLVE.

Petitioners have waived any due process objections they might otherwise assert by entering into a written waiver which expressly authorized the trial court to decide all disputed fees issues using the "abbreviated trial procedures" specified in that waiver, and by failing to object when the trial court later used those abbreviated procedures to determine the reasonableness of the fee requests.

A. Petitioners Have Waived Any Due Process Objections By Entering Into A Written Waiver.

It is undisputed that petitioners personally signed a document titled "Consent, Waiver And Stipulation Re: Abbreviated Trial, Etc." ("Waiver"). 1 App. 192-200. The express purpose of that Waiver was to abbreviate

the time required to complete what had already been an unusually long, bitterly contested, and expensive litigation. The Waiver specified the issues to which the Waiver would apply, and expressly included all disputes “concerning attorneys’ fees and litigation costs, the reasonable value thereof, the necessity thereof, the evaluation thereof, and the assessment, if any, to either party, their respective attorneys and/or to the community.” Waiver, Para. 25. The Waiver specified that the Court would permit a maximum of three days of trial time on these fees issues, and specified that petitioners would be permitted to take the depositions of both trial counsel (S&W and RR&P), but limited each deposition to a maximum of three hours. *Id.*

The Waiver contemplated that the parties would follow the procedures specified therein, but expressly specified that “the parties, by signing this agreement, hereby acknowledge that *the court will have full discretion to limit direct and cross-examination and the introduction of other evidence* to carry out the intent and purposes of this agreement.” Waiver, p. 1 (emphasis added).

Finally, the Waiver itself expressly acknowledges, and it is undisputed, that before signing the Waiver, Husband and Wife both “consulted with counsel independent of their respective trial attorneys,” and entered into the Waiver “based upon such consultation.” Waiver, Para. 26.² The Waiver was entered as an Order of the Court, and neither the Waiver nor the Order has ever been questioned or appealed.

² “Both petitioner and respondent have consulted with counsel independent of their respective trial attorneys as to the wisdom and ramifications of entering into this stipulation, and based upon such consultation, each hereby agrees that he and she have read and understood this stipulation and the benefits and risks of the procedure contemplated and outlined herein, and that each further waives his or her respective rights to object to the abbreviated trial procedure as set forth herein.”

Thus, petitioners expressly waived any objections they might otherwise have had to the procedures used by the trial court to determine the reasonableness of fees, by explicitly giving the trial court "full discretion" in that regard. Not surprisingly, the California Court of Appeal stressed this explicit waiver in rejecting petitioners' due process arguments in that court.³ Either independently, or as an adequate and independent state ground supporting the judgment below, petitioners' waiver makes this an inappropriate case for review.

B. Petitioners Have Waived Any Due Process Objections By Failing To Object To The Procedures Used By The Trial Court.

At no time did either petitioner, or independent counsel acting for either petitioner, ask to cross-examine S&W or RR&P, attempt to present any evidence in opposition to the applications for fees and costs filed by those firms that the trial court refused to receive, make any offer of proof regarding those applications, object to not being permitted to participate in the fees hearing on January 8, 1988, or object to the awards of attorneys' fees and costs contained in the judgment. 17 RT 4178-4343; 4398-4440; 19 RT 4931-33; 4891; 4 App. 959.

Thus, even if petitioners had not previously entered into an explicit waiver giving the trial court "full discretion" concerning these matters, their failure to offer

³ "The parties by their stipulation of October 19, 1987 conferred upon the court the jurisdiction to determine the necessity and reasonableness of the attorney fees and to allocate payment to either party or to the community. Additionally the parties agreed that 'the court will have full discretion to limit direct and cross-examination and the introduction of other evidence. . . .' This agreement was signed by both parties and their counsel. Additionally each party consulted their counsel prior to signing the stipulation."

any additional evidence, or to object at any point to the procedures the trial court actually used, constitutes a separate waiver of any due process objections they might otherwise assert. Again, either independently or as an adequate and independent state ground, their waiver makes this case an exceedingly inappropriate vehicle for resolving the constitutional question presented in the petitions.

III. THE DUE PROCESS QUESTION RAISED BY PETITIONERS IS NOT AN IMPORTANT QUESTION OF NATIONWIDE SIGNIFICANCE THAT REQUIRES REVIEW BY THE COURT AT THIS TIME.

Even if petitioners had not waived the due process question they ask the Court to resolve, that question is not of urgent importance to anyone other than the parties involved.⁴

First, petitioners have not shown that this question arises frequently; indeed, there is no showing that it has arisen at all, in any other case. Nor have petitioners shown that it is important for the Court to consider the question now, rather than after it has been considered by other lower courts.

Second, even apart from the waiver problems noted above, this case would be a very poor vehicle for addressing this due process question, because the judgment below is an intensely fact-specific judgment that is grounded in the unique facts of this unusual case.⁵

⁴ Indeed, except as an academic exercise, or as a matter of principle, the question is apparently of little or no actual significance even to the parties. See note 1, *supra*.

⁵ As the lower courts stressed, the substantial fees incurred in this case were generated by the unrelenting hostility of the petitioners, who directed their trial counsel to litigate every conceivable issue. California Court of Appeal at App. 5, and 8-10, in No. 91-635. Trial counsel repeatedly attempted to narrow the issues in order to avoid costly and unnecessary litigation, but their clients

Third, the decision below was correctly decided. The Due Process Clause does not require the active participation of independent counsel in the circumstances presented by this case. Here, the trial court “had substantial evidence before it to determine the necessity, reasonableness and amount of the attorney fees and costs,” and the “parties *were* afforded due process in the setting of the fees by the court.”⁶ The trial counsel had submitted sworn declarations and hundreds of pages of exhibits in support of their fee applications;⁷ there were “several days” of trial testimony regarding fees, including testimony of Husband’s independent counsel and of Wife’s adviser;⁸ and “[b]oth trial counsel took the stand and were cross-examined by the other counsel as to attorney fees and costs.”⁹ Finally, although the trial court had expressly authorized the independent counsel for Husband and for Wife to take depositions of trial counsel on fees issues for use at trial, they chose not to do so.¹⁰

In these circumstances, it is not surprising that the trial judge, who had overseen all of the litigation and was thus intimately familiar with the necessity for and quality of all work performed by trial counsel,¹¹ “decided he

insisted on a no-holds-barred strategy. *Id.* Trial counsel were *not* attempting to run up their fees; to the contrary, on numerous occasions, trial counsel unsuccessfully asked their clients, and then the trial court, to relieve them of responsibility. 3 RT 701:26-702:13; 5 RT 1075:27-1076:13; 7 RT 1634:19-1635:13; 1637:5-28; 1640:2-18; 10 RT 2426:8-2429:24; 16 RT 4132:23-24; 17 RT 4365:2-4370:1.

⁶ California Court of Appeal, at App. 18, 21, in No. 91-635 (emphasis added).

⁷ 2 App. 493 to 3 App. 931; 4 App. 989-1112; 4 App. 1113 to 5 App. 1417; 2 Supp. App. 2329-2610; 4 Supp. App. 3060.

⁸ 17 RT 4178-4343; 17 RT 4398-4449; 4 App. 959.

⁹ California Court of Appeal at App. 18, in No. 91-635.

¹⁰ 19 RT 4927.

¹¹ *Straub v. Straub*, 213 Cal.App.2d 792 (1963); *Pope v. Pope*, 107 Cal.App.2d 537, 539 (1951).

did not need any additional evidence to determine the reasonableness and necessity of attorney fees and costs and their allocation.”¹²

In view of these facts, the California Court of Appeal correctly decided that petitioners had been given a fair and meaningful opportunity to challenge the fee applications submitted by their trial counsel, had they chosen to do so, and had not been denied due process of law.

IV. THE PETITIONS CONTAIN NUMEROUS MIS-STATEMENTS AND OMISSIONS.

Pursuant to Rule 15 of the Rules of this Court, respondent notes that the petitions contain numerous misstatements and omissions, including those listed below. However, respondent will not burden the Court with argument concerning those misstatements and omissions because, for the reasons stated above, the petitions should be denied even if they contained no misstatements or omissions.

1. Husband and Wife have not disclosed the limitations they made in the scope of their respective appeals: Husband did not appeal portions of the judgment in favor of S&W; Wife did not appeal portions of the judgment in favor of RR&P.

2. Both Wife and Husband filed numerous documents requesting the trial court to make orders for attorneys' fees and costs under the authority of the Waiver, and California Civil Code §§ 4370 and 4370.5, based either on the financial need of the requesting party or on the misconduct of the opposing party.

3. The trial court found there were enormous delays and obstructions in the trial that were caused by the reprehensible conduct of Husband and Wife, not by any actions of their attorneys, who were expressly found not to have been at fault for any delays.

¹² California Court of Appeal at App. 18, in No. 91-635.

4. The “due process” claims asserted by both Husband and Wife were not raised before the trial court.

5. At no time before (or after) the January 8, 1988 fees hearing did the independent counsel for Husband or Wife ever attempt to schedule a deposition of anyone, including S&W or RR&P, even though they were expressly advised by the trial court that they had a right to take any deposition they wished.

6. At no time before the judgment, or after the judgment in post-judgment proceedings before the trial court, did the independent counsel for Husband or Wife ever attempt or even request to cross-examine either of the attorneys of record, nor did they ever attempt or even request to present any evidence (orally or in writing) in opposition to the applications for attorneys’ fees and costs.

7. At no time did either independent counsel ever make any offer or proof or file any document or objection to the awards of attorneys’ fees and costs contained in the judgment.

8. Contrary to the implication at page 2 of Husband’s petition that only counsel of record advised the parties with respect to the Waiver, each party had their own independent counsel (2 RT 328:5-14; 333:21-24; 3 RT 568:7-21; 7 RT 1641-66), who actively participated in negotiations and modifications of the Waiver. 7 RT 1741:5-1760:27; 1761:4-11; 1777:17-27; 1778:1779:6

9. The total value of community assets involved was over \$40 million, consisting of a wide variety of investments. 4 Supp. App. 2972; 5 Supp. App. 3158-72.

10. The trial court found that the “unrelenting, bitter belligerency” of Husband and Wife, Wife’s “unprovable and unrealistic” claims (App. at 1433), and Husband’s “attempts to control, dominate, and even to obstruct” (*id.*) made the pre-trial proceedings and trial “difficult,

oppressive and frustrating” (*id.* at 1435) and “caused . . . unreasonable delays and consumption of trial and lawyer time.” (*Id.* at 1433.)

11. For instance, Husband was admonished many times for interrupting the trial court and/or otherwise inappropriately addressing the trial court; for his failure to comply with discovery orders; for his failure to pay the court reporter; for uncontrolled outbursts; for his failure to respond appropriately to questions; for his refusal to cooperate and provide documents to Wife’s attorney; for his insistence on wasting time or otherwise incurring attorneys’ fees on unimportant or insignificant issues; and for failures to appear in court at all, or on time. See 2 App. 525-34 and 4 App. 1121-43.

12. The trial court found that Wife (in conjunction with her nonlawyer advisers) was “obsessed” with numerous claims that Husband was “secreting, concealing, mismanaging and misappropriating community property assets.” 6 App. at 1432. The trial court also found that Wife and her nonlawyer advisers “carried their suspicions much too far,” requiring her attorneys to seek evidence that did not exist and to assert “unprovable claims of misconduct by respondent.” *Id.* In addition, the trial court found that Wife’s “inability or unwillingness to give much testimony or to recall many facts or events occurring before or after the date of separation are unfortunate and have caused the court to question the credibility of much of her testimony and the validity of many of her contentions and claims.” 6 App. at 1440.

13. The trial court also found that Husband and Wife insisted that their attorneys present “bizarre, venal, evasive evidence each party felt was necessary often despite their own lawyers contrary advice.” 6 App. 1485:8-12.

14. Both Wife and Husband were admonished many times by the trial court for wasting court time and attorneys’ fees because of the issues they raised and/or their uncompromising attitude in this litigation.

15. Husband and Wife are extremely litigious: during the preceding 7 years Wife and/or Husband were parties in 110 separate lawsuits in the Los Angeles Superior Court. 2 Supp. App. 2247.

16. On November 30 the hearing on interim fees and costs scheduled for December 4 was announced in open court with both Husband and Wife present. 16 RT 3947:14-17.

17. Mr. Saul, Wife's independent counsel, stated that he opposed S&W's interim fee motion (17 RT 4370-73), and asked that the hearing be postponed until late the following week so that he could prepare an opposition for Wife. 17 RT 4374-75. The trial court agreed to continue the hearing to December 10. 17 RT 4377.

18. On December 10 Mr. Saul and Mr. Anteau, Husband's independent counsel, filed oppositions to the interim fee motions. 2 App. 468 and 461. The reasonableness or necessity of the fees and costs sought by S&W was not challenged by Mr. Saul (2 App. at 468), but was challenged by Husband's counsel. 3 Supp. App. 2648-53; 2667-73.

19. On December 21, after considering the oppositions to the interim fee and costs requests, the trial court entered its Order for Payment of Interim Attorneys' Fees and Litigation Costs. 4 App. 967-81.

20. Contrary to the suggestions in the petitions that the trial court did not hold hearings on the final attorneys' fee and cost issue, by mid-December the time limit for hearings on this issue had already been exceeded. On December 2, 3 and 4 and on December 15 there was extensive evidence on the attorney fee issue consisting of two days of testimony from Mr. Sigel (17 RT 4178-4343), $\frac{1}{2}$ day of testimony of Husband's independent counsel, Mr. Anteau (17 RT 4398-4449), then an additional day of testimony of Mr. Anteau, and of Joseph Gold, Wife's adviser. 4 App. 959.

21. From December 17 to January 8, Mr. Saul chose not to file any document or make any statement challenging either (1) the right of either counsel of record to ask for a final order for attorneys' fees and costs on behalf of their respective clients or (2) the reasonableness and necessity of any of the amounts claimed. Mr. Saul (and Mr. Anteau) chose not to take any depositions and therefore did not examine or cross-examine anyone.

22. Contrary to the statement in Husband's petition (at page 6) that the lawyers were asked to leave the courtroom, the trial judge specifically invited both independent counsel to remain in the courtroom. 19 RT 4933:9-11. Mr. Saul did address the trial court to ask to speak to his client, but he did not register any objection or make any offer of proof. 19 RT 4933:6-23. Mr. Anteau even testified on the attorneys' fee and litigation cost issue during that day, but also failed to make an objection or offer of proof. 19 RT 4933:20-23; 4891:8-19; 5002-5017.

23. Although Mr. Saul did file objections to the interim award of fees, he did not file any objection whatsoever to the final fee hearing.

24. There were four days of earlier testimony on the reasonableness, necessity and allocation of fees and costs (17 RT 4174-4343; 4398-4449; 4 App. 959), which exceeded the time allocated by the Waiver.

25. Declarations and written filings, which were the primary means of offering evidence, demonstrate that the challenges of the two law firms to each other's fees and costs were not cursory or collusive. In fact, they were quite contentious. 4 App. 997-1012; 1123-53; 4 Supp. App. 2871-2893.

26. The transcript of the January 8 hearing demonstrates that Mr. Anteau testified strenuously against Wife's fee and cost request (19 RT 5002-5017); that Mr. Robinson challenged Mr. Weiner about major components of his charges: what appeared to be unusually

high phone charges (19 RT 4949:18-4950:12); what activities justified a charge of \$193,510 in two months (19 RT 4950:13-4952:4); the basis for the hourly charge for word processing (19 RT 4954:9-26); the justification for the charge for air conditioning expenses during weekend work sessions (19 RT 4956:14-4957:3); the basis for charging interest on the unpaid balance (19 RT 4957:4-4958:15; 4965:9-25); and the basis for the large photocopying charge. (19 RT 4958:16-4963:15.)

27. The trial court also conducted an examination of Husband regarding his claim that some discovery conducted by S&W was necessary. 19 RT 4967:6-4972:3. The trial court and the two counsel of record then conducted examinations of various persons, related to who was responsible for missing documents and whether S&W had made unnecessary requests for documents. 19 RT 4975:11-5034:28. The hearing was not cursory or collusive.

28. On January 12, 1988, both parties filed post-trial briefs that requested orders for attorneys' fees and costs on behalf of their respective clients and opposed the fee requests of the other. 4 Supp. App. 2972; 3100.

29. At closing argument on January 15, 1988, both counsel of record requested an order for payment of attorneys' fees and litigation costs on behalf of their respective clients. Contrary to the implication of the statement in Husband's petition at page 6 that "neither party's trial lawyer questioned the fees requested by the other," both S&W and RR&P were instructed by the trial court not to repeat arguments contained in documents already filed. The attorneys therefore referred the trial court to the arguments and evidence contained in prior filings in support of their respective fees requests and in opposition to the fee requests of the other. 20 RT 5056:25-5060:21; 5110:16-5113:22.

30. Because of prior conduct of Husband and Wife, the trial court imposed a restraint on the transfer of

community assets. The trial court was concerned that community assets would be dissipated by the parties and not used to satisfy community liabilities, and appointed a receiver. See discussion at 6 Supp. App. 3469:1-13. The receiver was ordered to take possession of certain community assets and satisfy certain community liabilities, including the liability to the attorneys and accountants. 6 App. 1569-70.

31. A decision by this Court would have no effect on how Wife or Husband will be obligated for their fees and litigation costs under the judgment. One month *after* its entry, Wife and Husband agreed that, *regardless of this Court's ruling* they would reallocate their respective debt for the fees and costs under the judgment. 6 App. 1592. The ultimate result for the two parties will be the same regardless of whether this Court considers the entire judgment, or considers the portions Husband and Wife have actually appealed, or does nothing.

CONCLUSION

The petitions in Nos. 91-616 and 91-635 should be denied.

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